Lee Hospital *and* Laurel Certified Registered Nurse Anesthetist Associates, Petitioner. Case 6–RC–10136

December 21, 1990

DECISION ON REVIEW AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND RAUDABAUGH

On March 29, 1989, the Regional Director for Region 6 issued a Decision and Order in this proceeding. He found that the petitioned-for unit of all certified registered nurse anesthetists (CRNAs) employed by Lee Hospital (the Employer) in Johnstown, Pennsylvania, was not an appropriate unit for collective bargaining and dismissed the representation petition. In accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review, and the Board granted review on August 18, 1989.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the briefs on review,[1] and has decided to affirm the Regional Director's dismissal of the representation petition.[2] Consistent with the principles set forth in *St. Francis Hospital*, 271 NLRB 948 (1984) (*St. Francis II*), remanded 814 F.2d 697 (D.C. Cir. 1987), on remand 286 NLRB 1305 (1987) (*St. Francis III*),[3] we adopt the Regional Director's determination that no sharper than usual differences or disparities exist which would justify the petitioned-for unit of Lee Hospital CRNAs, excluding all of the hospital's other professional employees.

Lee Hospital is a 321-bed acute care facility with approximately 1200 employees. The CRNAs work in the anesthesia department of the hospital. The primary function of the CRNAs is to administer anesthesia and monitor care of the anesthesia patients in accordance with established policies and procedures and under the direction of an anesthesiologist or attending physician.

The anesthesia department, like all other hospital departments which provide direct patient care, is under the immediate supervision of a department head, who is a hospital employee, and a medical director, a licensed physician who is not an employee of the hospital. In those hospital departments which provide direct patient care, the department head is responsible for administrative and personnel matters, while the medical director is responsible for patient care matters.[4]

Chief Nurse Anesthetist Pavlosky, a stipulated supervisor, is the department head of the anesthesia department. The medical director, Dr. Quinn, is the president of Anesthesiology Associates, Inc. (AAI), a professional corporation that has independently contracted with the hospital for the operation of the anesthesia department and the recovery room. Pavlosky reports to both Quinn and the hospital vice president of professional services.[5] Pavlosky is the immediate supervisor of the CRNAs. The agreement between AAI and the hospital provides, inter alia, that AAI is responsible for the ''organization and supervision of personnel of the Department of Anesthesia, including (a) Submitting recommendations regarding personnel adjustments or additions, (b) Establishing and maintaining standards of care for Anesthesia Department consistent with the objectives of the Hospital, the development of procedures and routines that would provide for better utilization of personnel and skills within the Department.''

The Petitioner seeks review of the Regional Director's finding that a disparity of interests does not exist between the CRNAs and the other hospital professional employees sufficient to justify the creation of a separate unit for the CRNAs. However, as stated above, we adopt the Regional Director's determination that a separate unit of CRNAs is not appropriate. In applying the disparity-of-interests standard to the facts of this case, the Regional Director correctly noted that although certain differences exist between the CRNAs and the hospital's other professional employees, all of the hospital employees, including the CRNAs, are subject to common personnel policies and procedures[6] and share, for the most part, the same terms and conditions

[1] The American Association of Nurse Anesthetists (AANA) filed a brief as amicus curiae in this case.

[2] The Petitioner has requested oral argument. This request is denied as the record and briefs adequately present the issues and the positions of the parties.

[3] In *St. Francis II*, the Board held that the ''disparity-of-interests'' standard is to be used in resolving bargaining unit questions for health care institutions. 271 NLRB at 953. Thus, a separate unit of health care employees is not appropriate unless the Board concludes that sharper than usual disparities or differences have been shown to exist with respect to the normal community-of-interest criteria for the requested employees and those in an overall professional or nonprofessional unit. The Board's normal community-of-interest criteria include wages, hours, and working conditions; qualifications, training, and skills; frequency of contact and degree of interchange with other employees; frequency of transfer to and from the petitioned-for unit; commonality of supervision; degree of integration with the work functions of other employees; area practice and patterns of collective bargaining; and collective-bargaining history. 271 NLRB at 953 fn. 35. In *St. Francis III*, the Board reiterated the position, set forth in *St. Vincent Hospital*, 285 NLRB 365 (1987), that pending completion of the health care unit rulemaking, the Board would apply existing law, i.e., the disparity-of-interests standard.

[4] Hospital President and Chief Executive Officer John Ungar testified that various medical directors, or their professional corporations, have individual contracts with Lee Hospital and that this is a common arrangement throughout the hospital industry. Lee Hospital has separate medical directors in the following departments: surgery; medicine, internal medicine, and intensive care; coronary care; radiology; physical medicine; medical oncology; emergency; obstetric/gynecology; employee health laboratory; radiation oncology; and anesthesia.

[5] Lee Hospital is under the overall supervision of Ungar. Six vice presidents report directly to Ungar, including the vice president of professional services who is responsible for the anesthesia department.

[6] The hospital's employee handbook contains hospital policies applicable to all hospital employees, including CRNAs, regarding such matters as, inter alia, attendance, preemployment physicals, employee complaint procedure, personal appearance, hospital rules, behavior standards, and disciplinary action.

of employment, including common fringe benefits;[7] participate in the hospital's new employee orientation program and periodic in-service programs; receive the same percentage general wage increases; and are paid 4-hour minimum call-in pay as are other patient care employees. The Regional Director also recognized that the hospital's team approach to patient care results in frequent and substantial interaction and contact between CRNAs and other professional employees of the hospital.

In its brief on review, the Petitioner argues that there exists a sufficient disparity in wages, salaries, and working conditions of CRNAs to warrant a finding that a separate CRNA unit is appropriate. The Petitioner argues that, in contrast to other professional employees, CRNAs are salaried exempt employees, guaranteed an 80-hour pay period every 2 weeks;[8] are required to work a 24-hour coverage shift and may also be scheduled to work a 32-hour shift consisting of 8 hours following 24 on-call hours; are routinely scheduled for late coverage;[9] do not receive premium pay for all hours of overtime worked as do all but two professional employees of the hospital;[10] and are subject to being designated by the hospital as being ''absent with pay'' (AWP) or ''absent without pay'' (AWOP).[11] The Regional Director found, however, that the unique scheduling and overtime compensation applicable to CRNAs is due largely to hospital and anesthesia department requirements on how best to utilize the CRNA staff to meet patient needs. The record shows that other hospital departments have devised a variety of scheduling formats to provide patient care coverage.

The Petitioner also argues that AAI is a joint employer with Lee Hospital of the CRNAs and that this relationship further evidences the disparity of interests that exists between CRNAs and other professional employees. The Regional Director found it unnecessary to pass on the issue of whether AAI is a joint employer of the CRNAs, based on his finding that ''the relationship existing between AAI and the CRNAs does not compel the conclusion, even when considered in conjunction with the other factors relied upon by the Petitioner in support of its disparity-of-interests contentions and particularly in view of the congressional admonition against undue proliferation of units in the health care industry, that the petitioned-for unit of CRNAs is appropriate for collective bargaining purposes.''

We conclude, contrary to the Regional Director, that the joint employer issue must be resolved to determine whether a separate CRNA unit is appropriate, not because the issue is determinative with respect to the disparity-of-interests analysis, but because, as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent.[12] Thus, if AAI is a joint employer, the CRNAs could be included in the unit with other professionals employed by Lee Hospital only with the hospital's consent. It is clear that Lee Hospital does not consent to such an arrangement.

The appropriate standard for determining joint employer status is whether two separate entities share or codetermine those matters governing the essential terms and conditions of employment. Further, to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *TLI, Inc*., 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984). In examining the relationship between AAI and Lee Hospital, we find that AAI does not possess sufficient control over the essential terms and conditions of employment of the CRNAs to establish that it is a joint employer.

In its brief on review, the Petitioner argues that the following factors establish that AAI is a joint employer. The agreement between Lee Hospital and AAI provides that AAI is responsible for the operation of the anesthesia department, including its organization and supervision. Dr. Quinn supervises and evaluates the clinical performance of CRNAs on a daily basis. Quinn or his associate Dr. Kim, the other shareholder in AAI, ''almost exclusively'' makes decisions with regard to daily work assignments, the number of CRNAs that are to report to work each day, the identity of scheduled CRNAs who are not to report to work because of abbreviated operating room schedules,

[7] All hospital employees, including CRNAs, receive the same health insurance, life insurance, pension plan, annuity plan, disability income plan, vacation, holidays, sick leave, funeral leave, and educational assistance.

[8] Other than emergency room physicians, who have a contract with Lee Hospital, the only other salaried nonsupervisory employees of the hospital are the director of reimbursement and the hospital accountant.

[9] Seven CRNAs are generally scheduled to work each weekday from 7 a.m. to 3:30 p.m. to provide coverage for the hospital's six operating rooms which are normally in operation during this period. Each weekday two of the seven CRNAs are scheduled on a rotating basis to work beyond 3:30 p.m. pursuant to the department's ''first late/second late'' system. The CRNA designated as ''first late'' is required to work past 3:30 p.m. if any surgery is still in progress. The designated ''second late'' CRNA is required to work if needed and carries a paging device when she leaves the hospital following the end of her shift so that she may be contacted if necessary to report back to work in emergency situations.

[10] The director of reimbursement and the hospital accountant are the only other professional employees not paid time-and-a-half for hours worked over 40 hours a week. CRNAs do not receive premium pay for overtime work resulting from the ''first late/second late'' system. The scheduled 24-hour shift which CRNAs are required to work every 2 weeks is included in the 80-hour guarantee and is not compensated at premium pay.

[11] When fewer CRNAs than the number originally scheduled to work are needed to report due to an abbreviated operating room schedule, Pavlosky, after consultation with Quinn, determines who will be instructed not to report and whether the absence from work will be with or without pay.

[12] See *Greenhoot, Inc*., 205 NLRB 250 (1973), in which the Board refused to establish a multiemployer unit absent a showing that the employers involved had expressly conferred on a joint bargaining agent the power to bind them in negotiations or that they had by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action. 205 NLRB at 251.

when to call a CRNA to work in an ''on-call'' situation, and when to allow the CRNAs to leave at the end of the day or to take lunch breaks and midday breaks. The Petitioner adds that AAI, through Quinn, has participated in the formulation of policies impacting on the working conditions of the CRNAs involving anesthesia department procedures. Specifically, the Petitioner notes that the record shows that Quinn is coauthor of a number of department guidelines relating to reduced scheduled working hours, reporting off policies, vacation policy, reducing scheduled work hours, and the department time schedule. The Petitioner also asserts that Quinn was actively involved in discussions between Lee Hospital and the CRNAs concerning overtime compensation and the hospital policy requiring on-call CRNAs to carry beepers. Quinn, in conjunction with Chief Nurse Anesthetist Pavlosky, establishes the qualifications of the CRNAs at Lee Hospital by reviewing and writing the CRNA job description. Quinn has the authority to discipline CRNAs in the form of oral and written reprimands and on one occasion transferred a CRNA to another department because of poor work performance. Quinn has participated significantly in the hiring of CRNAs by hiring six CRNAs without prior approval or consultation with hospital administration.[13] Finally, the Petitioner asserts that AAI receives direct profit from the CRNAs by billing directly all individual patients and/or their respective third-party payors, other than medicare patients, for the professional services of the CRNAs while only paying Lee Hospital a set hourly rate for CRNAs. AAI also represents on various reimbursement forms that the CRNAs are employees of AAI. The Petitioner argues that by recouping a significant profit for CRNA professional services, AAI is representing and treating the CRNAs as its own employees.

The record shows that AAI, through Quinn by virtue of his responsibilities as medical director in charge of patient care, exercises some control in the day-to-day operation of the anesthesia department. However, Pavlosky has primary responsibility for administrative and personnel matters, including preparing work schedules, making regular overtime assignments (first late/second late schedule), and determining the number of CRNAs reporting for work. Although Quinn assigns CRNAs to the operating rooms, Pavlosky can make changes to Quinn's assignments as needed without consulting Quinn. Pavlosky prepares the nonabbreviated work schedule designating who will report to work. In case of an abbreviated work schedule, Pavlosky testified that she suggests which CRNAs will be instructed not to report and Quinn testified that he has always followed Pavlosky's proposal. The record further shows that Quinn is not involved in the decision as to whether a CRNA's absence from work will be designated as absent with pay or absent without pay. Quinn determines when patient care needs necessitate requesting an on-call CRNA to report and when a CRNA may take breaks or leave at the end of the day. Pavlosky schedules vacation and handles requests for nonemergency leave.

With respect to promulgation of policies affecting working conditions, the record shows that Quinn has jointly formulated with Pavlosky a number of policies impacting on the working conditions of the CRNAs, for example, reduced-hour work schedules and time off, and has participated with Pavlosky in discussions between the CRNAs and the hospital administration concerning the anesthesia department's overtime compensation policy and beeper policy. The decision to implement the overtime and beeper policies, however, was made by the hospital. Thus, although Quinn in his capacity as medical director exerts control over matters affecting the day-to-day operation of the anesthesia department, the record clearly establishes that President Ungar retains ultimate control over the medical directors[14] on all matters and, in particular, labor relations.

The record shows that Quinn hired six CRNAs without following the formal hiring procedure. All these individuals were either past employees of the hospital or student anesthetists of the now defunct Lee Hospital School of Anesthesia.[15] President Ungar had final approval over these and all hiring decisions.

Quinn, like all department heads and medical directors of the hospital, has authority to discipline employees with respect to conduct related to patient care. Discipline based on conduct unrelated to patient care is handled by Pavlosky or the hospital personnel department. ''Serious'' disciplinary matters involving breaches of hospital behavior standards or rules of conduct (which are specified in the hospital's employee handbook) are investigated by the personnel director who then makes a recommendation to the department head and the vice president.[16] Quinn does not have the authority to terminate an employee. Quinn testified that he has the authority to recommend discharge, but has never exercised that authority.

We are not persuaded that AAI's profiting from the CRNAs' services or its representation to patients or third-party payors that it is billing for the medical di-

[13] Quinn's action is inconsistent with the hospital's formal hiring procedure. President Ungar testified that the hiring procedure is initiated by the hospital's personnel department. After a candidate completes a written application, the candidate is interviewed by the appropriate department supervisor and medical director who submit evaluations and recommendations to personnel with Ungar having final approval authority on all employee hiring. Normally, the personnel department communicates the formal offer of employment to the candidate.

[14] The agreement between Lee Hospital and AAI provides that it can be terminated by either party at any time subject to a 120-day written notice of termination requirement. Unless terminated, the agreement is deemed automatically renewed annually.

[15] The student anesthetists were employees of the hospital under Quinn's supervision at the time he extended to them offers of employment as CRNAs.

[16] Employee grievances are submitted to the department head, the vice president of professional services, or the personnel department.

rection of its own employees demonstrates that AAI is a joint employer of the CRNAs. First, we note that the hourly rate of reimbursement that AAI owes to Lee Hospital for a CRNA's services is set by the hospital and is not negotiable between the hospital and AAI. Further, the record clearly shows that Lee Hospital, not AAI, determines the essential terms and conditions of employment of the CRNAs. President Ungar determines labor relations policy. Lee Hospital sets the wages, and salary and fringe benefit policies for the CRNAs.

AAI's involvement in the day-to-day operation of the anesthesia department does not demonstrate that AAI maintains sufficient control over the terms and conditions of the CRNAs' employment to constitute a joint employer with Lee Hospital. The supervision and direction exercised by AAI, through Quinn, on a day-to-day basis is related to the physician-nurse relationship and patient care issues. Quinn has limited hiring and disciplinary authority and lacks firing authority. As discussed above, although Quinn assigns CRNAs to operating rooms, Pavlosky schedules work, vacation, sick leave, and overtime. Personnel policies and procedures are administered by the hospital. Although Quinn has formulated some department policies and participated in discussions between the Hospital and the CRNAs concerning various policies, the final decision to implement these policies was made by President Ungar.[17] Further, we note that President Ungar retains ultimate control over the hospital's medical directors on all matters. Under these circumstances, we do not find that AAI shares or codetermines those matters governing the essential terms and conditions of employment to an extent that it may be found to be a joint employer.

Accordingly, we affirm the Regional Director's Decision and Order dismissing the petition based on his finding that the petitioned-for unit of CRNAs is not an appropriate unit.[18]

ORDER

The petition is dismissed.

[17] See *TLI, Inc.*, supra, in which the Board held that participation in bargaining sessions where the party did not control the economics of the relationship did not establish a joint employer relationship.

[18] We note that the Petitioner does not wish to proceed to an election with the CRNAs on a broader basis.